OFFICE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 171

EDDIE V. HANNA, PETITIONER,

vs.

EDWARD M. PLUMER, JR., EXECUTOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 10, 1964
CERTIORARI GRANTED OCTOBER 12, 1964

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RELEVANT DOCKET ENTRIES

1963

Feb.	6	Complaint (jury claim) filed
	6	Summons issued
	20	Sums. retd by Marshal, served Feb. 8, 1963 filed
	26	Appearance of Alfred E. LoPresti for deft. Edward M. Plumer, Jr., Ex. of Est. of Louise Plumer Osgood filed
	26	Deft's answer (jury claim) filed
May	6	Appearance of James T. Connolly for deft. filed
Aug.	5	Interr. prop. by dft. to be ans. under oath by pltf., Eddie V. Hanna filed and c/s
	26	Deft motion for Summary Judgment filed
Sept.	30	SWEENEY, Ch.J. Hearing on deft's motion for summary judgment; taken under advisement.
Oct.	2	Pltff's memorandum filed
	17	SWEENEY, CH.J. OPINION. . . . Motion for summary judgment is ALLOWED. Copies to Joseph Scheider, Esq., Virgil F. Mills, Esq., Alfred E. LoPresti, Esq., James T. Connolly, Esq.
Nov.	14	SWEENEY, CH.J. After hearing on deft's. motion for summary judgment and in accordance with the Opinion of the Court handed down on October 17, 1963 allowing said motion, it is ORDERED judgment for the deft. dismissing the pltff's. Complaint, entered. Copies to Joseph Scheider, Esq., Virgil F. Mills, Esq., Alfred LoPresti, Esq., James T. Connolly, Esq.
Dec.	9	Notice of Appeal filed by pltff. cys of N/A to Messrs LoPresti and Connolly.
	9	Bond on Appeal—costs, filed ($250—St. Paul Fire & Marine Ins. Co as surety thereon.
	17	Original pleadings del'd to Ct of Appeals

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 7th day of February 1963, I received this summons and served it together with the complaint hereto as follows thereafter on the 8th day of February 1963, at 4:00 PM I summoned the within defendant, Edward M. Plumer by leaving at his last and usual place of abode, 8 High Rd., Newburyport, in said District in the hands of his wife, Mrs. Edward M. Plumer, a true and attested copy of this Summons together with copy of Complaint.

ROBERT F. MOREY
United States Marshal.

By F. J. OCZKOWSKI
Deputy United States Marshal.

MARSHAL'S FEES
Travel $8.88
Service 3.00

Subscribed and sworn to before me, a this day of 19
[SEAL]

NOTE—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 63-91-S

EDDIE V. HANNA
2029 - 14th Street
Cuyahoga Falls, Ohio
PLAINTIFF

v.

EDWARD M. PLUMER, JR.,
EXECUTOR OF THE ESTATE OF
LOUISE PLUMER OSGOOD, DECEASED,
8 High Road
Newburyport, Massachusetts
DEFENDANT

COMPLAINT
(Jury Trial Requested)

1.) Plaintiff is a citizen of the State of Ohio, and the defendant is a citizen of the Commonwealth of Massachusetts. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000).

2.) Plaintiff says that on or about November 5, 1961, she was a bona fide resident of Fort Lauderdale, County of Broward and State of Florida, and is now, at the time of the filing of this petition, a resident of Cuyahoga Falls, Summit County, Ohio.

3.) Plaintiff further says that on the 5th day of November, 1961, the defendant's decedent, Louise Plumer Osgood, was a bona fide resident of and residing at 225 Water Street, Newburyport, Essex County, Massachusetts.

4.) Defendant is the duly appointed, qualified and acting Executor of the Estate of Louise Plumer Osgood, deceased, and said decedent's Estate is being probated in the Probate

Court of Essex County, in the Commonwealth of Massachusetts.

5.) Plaintiff further says that a Notice of Claim in the amount of this petition was duly filed in the Registry of Probate of Essex County in the Commonwealth of Massachusetts in said Estate and a copy of said claim of the plaintiff was likewise duly given to the defendant Executor of said Estate within the time required by law for the filing of a claim in a decedent's estate.

6.) Plaintiff says that this action herein is brought upon said claim within the time required and in accordance with the procedure of the law of the Commonwealth of Massachusetts in filing suit against the said decedent's Estate.

7.) Plaintiff says that South Carolina State Route, or Highway No. 301 is a duly dedicated highway running in a general northerly and southerly direction through the County of Bamberg in the State of South Carolina, and that it is a two lane highway of blacktop composition of approximately twenty-four (24) feet in width.

8.) Plaintiff further says that on November 5, 1961, at approximately 11:00 A.M. at a point approximately two (2) miles south of the town of Bamberg, South Carolina, the said plaintiff was driving and operating her 1958 two door Chevrolet automobile in a northerly direction, and at said place on said State Route No. 301 a county road adjoined and intersected said highway on the east side of State Route No. 301.

9.) Plaintiff says that at said point, where South Carolina State Route No. 301 and said county road join, a Ford automobile, traveling in a southerly direction, had stopped in the south bound lane of highway travel preparatory to making a left hand turn and waiting for this plaintiff to pass said intersection or juncture.

10.) Plaintiff says that the defendant's decedent, at

said time and place, was driving and operating a four door 1957 Oldsmobile, also in a southerly direction on the south bound or west portion of South Carolina State Route No. 301, at a speed in excess of sixty (60) miles per hour, and as defendant's decedent approached the point on said State Route No. 301 where said Ford automobile, going in the same direction as defendant's decedent, had stopped, the said defendant's decedent failed to slacken her speed or come to a stop to the rear of said Ford automobile, and then did drive and operate her car over onto the north bound lane of said highway and into and against the automobile of the plaintiff, who was proceeding northerly on her, the plaintiff's, own half or portion of said State Route No. 301 at said time and place.

11.) Plaintiff says that said decedent was guilty of negligence by reason of violation of the law of South Carolina governing and regulating traffic on a highway at the time and date of said accident herein described, and that said violation of traffic regulations by defendant's decedent was contrary to the statutes known as The Uniform Act Regulating Traffic on Highways of the State of South Carolina, as set forth in Chapter 46, Sections 211 to 691, inclusive, of the duly enacted and existing laws of the State of South Carolina, which statutes control and govern the rights and the duties of the plaintiff and the defendant's decedent at the time and place involved herein.

12.) Plaintiff says that the defendant's decedent, in driving and operating her automobile into and against the plaintiff's automobile on plaintiff's portion of said highway, caused plaintiff's automobile to be brought to an abrupt stop and in so doing, caused plaintiff's body to be thrown forward and against the steering wheel of her own car and against the hard interior portions thereof, causing plaintiff to sustain serious, painful, permanent and disfiguring injuries to her body and person as hereinafter set forth.

13.) Plaintiff says that the defendant's decedent was negligent in the following respects, to-wit:

a) In driving and operating her said Oldsmobile automobile at said time and place without due regard or care for other persons lawfully using said highway at said time and place,

b) In driving and operating her said Oldsmobile automobile at said time and place without maintaining and keeping said automobile under proper direction and control,

c) In operating her said Oldsmobile automobile at a high and excessive rate of speed, to-wit: in excess of sixty (60) miles per hour in a thirty-five (35) mile an hour zone,

d) In driving and operating her said Oldsmobile automobile without proper brakes or braking devices in operating order, which would enable her to slow down and stop her automobile before striking automobile traffic ahead of her on said highway,

e) In driving and operating her said Oldsmobile automobile from her own portion of the highway over onto plaintiff's portion of said highway at said time and place,

f) In driving and operating her said Oldsmobile automobile from her own portion of the highway over onto plaintiff's side of the highway without any signal, sign or warning of her intention so to do,

g) In driving and operating her said Oldsmobile automobile at said time and place over onto plaintiff's portion of the highway when the same could not be so operated without injury and harm to this plaintiff, and

h) In driving and operating her said Oldsmobile automobile without maintaining a proper lookout ahead for other vehicular or automobile traffic lawfully upon said road or highway at said time and place.

14.) Plaintiff says that as a result of defendant decedent's driving and operating her car into and against plaintiff's car, the plaintiff received a crushing force and blow to her head, body, arms and legs resulting in a bruising and twisting of her entire head, neck, body, arms and legs, as well as causing her to receive a wrenching and twisting of the joints, ligaments, nerves, veins, arteries and muscles over and about her entire person and body.

15.) Plaintiff says that the left portion of her head in the area of the hair was bruised and swollen and resulted in discoloration; that her nose was cut, impregnated with glass, swollen and made painful; that her mouth was cut and bruised in the area of her lips, cheeks and gums; that her lips were cut and bruised; that her teeth were loosened throughout the upper and lower jaw; that one front upper tooth was broken and another front upper tooth was cracked, and that various other front and back teeth, in both the upper and lower jaws, were chipped; that the nerves in her teeth sustained trauma and injury and have been permanently injured.

16.) Plaintiff further says that she sustained three (3) fractured ribs on her right side of her chest; that she suffered and sustained a fractured patella in the knee of the right leg with a loss of a portion of said patella, together with cuts and lacerations over and about her head, face, body, arms and legs from broken glass.

17.) Plaintiff says that she was in pain and shock following said accident and was removed to Bamberg County Hospital where she was placed under the care and attention of physicians and nurses from the 5th day of November, 1961, until the 16th day of December, 1961, during which time surgery, in the nature of an open reduction, was performed on the right knee; that she was totally confined to her hospital bed, and that she was placed under drugs and medicine to alleviate the pain from the fractures, wounds,

bruises and injuries which she had over and throughout her person and body. Plaintiff says that while she was hospitalized in Bamberg, South Carolina, she developed as a result of her injuries a thrombo phlebitis condition in the right leg, all of which caused her pain and suffering, and together with her other injuries rendered it impossible for her to sleep, eat or rest normally or properly.

18.) Plaintiff says that during the time she was hospitalized at Bamberg, South Carolina, her head was swollen, sore and painful; that she suffered headaches and still to this date continues to suffer headaches; that during the time she was in the Bamberg County Hospital, her nose was swollen and sore; her arms were discolored and sore, and that she was unable to normally move the same, and still has pain and difficulty in the normal movement of her arms, and more particularly there has developed a numbness in the left arm and hand; that during her confinement in the hospital in Bamberg, South Carolina, she had difficulty in breathing and, as of this date, still experiences pain in deep breathing.

19.) Plaintiff says that on December 16, 1961, she was removed from Bamberg County Hospital and admitted to Akron City Hospital in Summit County, Ohio, on the 21st day of December, 1961, where she was confined under treatment and care for her injuries until the 6th day of January, 1962. During her confinement in Akron City Hospital she was treated for a swelling of both the right and left leg and for a limitation of motion involving both legs.

20.) Plaintiff says that after her confinement and treatment in Akron City Hospital and her discharge therefrom, she continued under further medical care and attention and was again hospitalized on the 2nd day of August, 1962, until August 12, 1962, at Medina Hospital in Medina, Ohio, for an examination and treatment of the continuing thrombo phlebitis condition of the right leg.

21.) Plaintiff says that during said hospitalization confinement and the intervals between hospitalization and up to the present time, she suffers pain and discomfort and is unable to sleep, eat or rest properly and that she has difficulty in walking and moving about by reason of her injuries.

22.) Plaintiff says that she sustained an injury to her sacroiliac as a result of said automobile accident and that she has had discoloration marks on her body for many months following said accident, and that she continually suffers pain, discomfort and limitation of motion in her arms, back and legs, and avers that all of the said injuries to her head, teeth, bones, blood vessels, nerves, muscles, joints and ligaments are permanent and that she will never regain her former good health which she had prior to said accident and that she will never again be able to be active and engage in activities as she was able to do prior to said accident; that she will continue to suffer pain and discomfort for the remainder of her natural life and will be required to be under the care and treatment of doctors and nurses.

23.) Plaintiff further says that as a result of the injuries which she suffered and sustained in said accident she has been obliged to expend and contract for medical care, nursing, hospitalization and drugs the sum of Thirty-three Hundred Dollars ($3,300) to date and that she will be obliged to expend additional money and contract for further care and treatment in the future.

24.) Plaintiff further says that she sustained the first One Hundred Dollars ($100) damage to her automobile for which she has not as yet been compensated and that said property damage is part of her claim herein.

25.) Plaintiff further says that all of the pain, sickness, disability, discomfort and injuries which she has suffered and will continue to suffer, as long as she lives, together

with the expenditures of money for medical care and services now expended and those to be expended in the future, together with her property damage herein, were brought about and caused solely and proximately as a result of the negligence of defendant's decedent as hereinbefore set forth, and that by reason thereof, she has been damaged in the sum of One Hundred Twenty-five Thousand Dollars ($125,000) for which amount she prays judgment.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of One Hundred Twenty-five Thousand Dollars ($125,000) and her costs.

(s) VIRGIL F. MILLS
MILLS & MILLS
917 First National Bank Bldg.
Canton 2, Ohio
Attorneys for Plaintiff.

DEFENDANT'S ANSWER

Now comes the defendant in the above entitled action and makes Answer to the Plaintiff's Complaint as follows:

1. The defendant admits the allegations in Paragraph 1 of the Plaintiff's Complaint, but denies that the amount in controversy exceeds exclusive of interests and costs the sum of $10,000.00.

2. The defendant admits the allegations in Paragraph 2.

3. The defendant admits the allegations in Paragraph 3.

4. The defendant admits the allegations contained in Paragraph 4.

5. The defendant denies that Notice of Claim was given to the defendant or filed with the Registrar of Probate of Essex County as provided for and required by Chapter 197, Section 9 of the General Laws of the Commonwealth of Massachusetts.

6. The defendant denies the allegations contained in Paragraph 6. In further answering the defendant says that this action and the claim which is the subject matter of this action are barred by the provisions of Chapter 197, Section 9 of the General Laws of the Commonwealth of Massachusetts.

7. The defendant admits the allegations contained in Paragraph 7.

8. The defendant admits the allegations contained in Paragraph 8.

9. The defendant has no personal knowledge of the facts alleged in this paragraph of the Plaintiff's Complaint, and therefore, cannot admit nor deny same, but leaves the plaintiff to establish same by competent evidence at the trial of this action.

10. The defendant has no personal knowledge of the facts alleged in this paragraph of the Plaintiff's Complaint, and therefore, cannot admit nor deny same, but leaves the plaintiff to establish same by competent evidence at the trial of this action.

11. The defendant has no personal knowledge of the facts alleged in this paragraph of the Plaintiff's Complaint, and therefore, cannot admit nor deny same, but leaves the plaintiff to establish same by competent evidence at the trial of this action. The defendant further denies that the deceased was negligent in the operation of her motor vehicle or that she violated any of the laws pertaining to the operation of motor vehicles at the time and place alleged in this paragraph.

In further answering this paragraph, the defendant says that the plaintiff, herself, was contributorily negligent in the operation of her motor vehicle, and is therefore, not entitled to recover in this action.

12. The defendant has no personal knowledge of the facts alleged in this paragraph of the Plaintiff's Complaint,

and therefore, cannot admit nor deny same, but leaves the plaintiff to establish same by competent evidence at the trial of this action.

13. The defendant has no personal knowledge of the facts alleged in this paragraph of the Plaintiff's Complaint, and therefore, cannot admit nor deny same, but leaves the plaintiff to establish same by competent evidence at the trial of this action.

14.-24. inclusive. The defendant has no knowledge of the allegations as to personal injuries, medical expense, disability and other damages alleged by the plaintiff to have been sustained by her in these paragraphs of the Complaint. The defendant, therefore, neither admits nor denies the allegations contained therein, but leaves the plaintiff to establish same by competent evidence at the trial of this action.

25. The defendant denies that the plaintiff's injuries and damages are as alleged by the plaintiff in this paragraph. The defendant further denies that the injuries sustained by the plaintiff as may be established by competent testimony at the trial are in the sum of money claimed by the plaintiff as damages in this action.

26. The defendant further answering the Plaintiff's Complaint says that this action cannot be maintained against the defendant executor of the Estate of Louise Plumer Osgood for the reason that it is brought contrary to and in violation of the provisions of Massachusetts General Laws (Ter. Ed.) Chapter 197, Section 9.

27. The defendant hereby claims a trial by jury of this action.

By his Attorney,

ALFRED E. LOPRESTI
44 School Street
Boston 8, Massachusetts

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Now comes the defendant in the above entitled action and moves the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a judgment in the defendant's favor dismissing the action on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law.

In the affirmative, the defendant moves upon the pleadings herein, the affidavit of the defendant, Edward M. Plumer, Jr. sworn to April 15, 1963, annexed hereto, the two certificates of the Probate Court for the County of Essex, annexed hereto, and the certificates and return of the United States Marshal in this action for Summary Judgment in favor of the defendant in this action.

This motion is based upon the contention of the defendant as set forth in paragraphs 5 and 6 of the defendant's answer that this action was not brought in accordance with the requirements of the General Laws of Massachusetts, Chapter 197, Section 9.

By his Attorneys,
(s) ALFRED E. LOPRESTI
(s) JAMES T. CONNOLLY

OPINION

October 17, 1963

SWEENEY, CH.J. This motion for summary judgment raises the narrow question whether the action is timely in conformity with the short statute of limitations, M.G.L.A. c. 197, § 9. The defendant was qualified as executor by giving bond on March 1, 1962. The plaintiff, who has a claim against the estate, filed this complaint on February 6, 1963. Service was made the following day by leaving a

copy of the summons and complaint at the defendant's last and usual place of abode in the hands of his wife. While completely proper under Rule 4(d), F.R.C.P., this was not service in hand as required by c. 197, § 9.

M.G.L.A. c. 197, § 9, provides as follows:

> "Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate. . . ."

Jurisdiction in this case is based on diversity of citizenship and the Massachusetts statute, therefore, controls. *Ragan* v. *Merchants Transfer Co.*, 337 U.S. 530 (1949). *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945).

Under the statute, three courses were open to the plaintiff: 1) service by delivery in hand upon the defendant within one year after the latter qualified, 2) acceptance by the defendant of service within that time, or 3) filing of notice in the proper registry of probate.

The plaintiff does not deny his failure to comply with the first alternative, but he argues that the defendant by filing an answer, accepted service of process. *Phillips* v. *Director General of Railroads*, 251 Mass. 263 (1925). In that case a substituted defendant appeared specially to contest jurisdiction, and the court held that this was equivalent to a waiver of the issuance of process. Here, however, the question is not one of waiver but whether the defendant

accepted service. His affidavit denies that he did, and a general appearance of the defendant does not cure service defective under this statute. *Epstein* v. *Blender*, 16 Mass. App. Dec. 75 (1957). Moreover, the fact that the defendant may have had actual notice of the action is irrelevant because, as Judge Aldrich pointed out in *John Boyle* v. *Margaret G. Moylan, Executrix*, Civil No. 54-507-A, D. Mass., November 17, 1955, "[T]he Massachusetts statute makes no such exception and apparently was intended to avoid altogether such factual issues."

With respect to the third alternative, the plaintiff also did not comply with the requirements of the statute in that the "notice" he filed did not show "the court in which the action has been brought," which, indeed, he could not show as the "notice" was filed more than nine months before this suit was instituted.

The motion for summary judgment is allowed.

JUDGMENT

SWEENEY, CH.J. After hearing on defendant's motion for summary judgment and in accordance with the Opinion of the Court handed down on October 17, 1963 allowing said motion, it is

ORDERED judgment for the defendant dismissing the plaintiff's Complaint.

By the Court
(s) F. J. AHERN
Deputy Clerk.

(s) GEO. C. SWEENEY
Chief Judge
United States District Court
11-14-63

NOTICE OF APPEAL

The Plaintiff hereby gives notice that he appeals from the judgment of this Honorable Court, dated November 14, 1963, to the United States Court of Appeals, for the First Circuit.

By his Attorneys,

SCHNEIDER & REILLY

By (s) ALBERT P. ZABIN

ADDITIONAL RECORD APPENDIX TO BRIEF OF APPELLEE.

The appellee hereby designates the following additional record appendix: The following documents attached to and submitted with defendant's motion for summary judgment:

1. Affidavit of Executor, dated April 15, 1963, that he had not been served in hand in the present action, and had never accepted service of process in said action.

2. The original summons and United States Marshal's return of service.

3. Certified copy by the Register of Probate for Essex County of notice of claim filed by the plaintiff in the Probate Court, dated April 17, 1962.

4. Certified copy by the Register of Probate for Essex County, dated March 20, 1963, indicating the defendant's appointment as executor of the estate of Louise Plumer Osgood, the date of the giving of his bond, and all docket entries.

Affidavit.

I, Edward M. Plumer, Jr. of Newbury, Essex County, Massachusetts, on oath depose and say that I am the duly appointed and qualified executor under the will of Louise Plumer Osgood, late of Newburyport in said County, Essex Probate No. 270749 and that the date of my appointment as such executor and that the approval of my bond as such executor was March 1, 1962; that at no time have I been served in hand in an action brought by Eddie V. Hanna, Docket No. CA63-91-S brought in the United States District Court for the District of Massachusetts and that I have never accepted service in said action.

EDWARD M. PLUMER, JR.

COMMONWEALTH OF MASSACHUSETTS.

Essex, ss April 15, 1963

Subscribed and sworn before me,

JAMES T. CONNOLLY
Notary Public
My commission expires Feb. 7, 1970

Summons.

Summons in a Civil Action

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Sweeney, Ch.J.

.....Division

Civil Action File No. 63-91-S

EDDIE V. HANNA
Plaintiff

v.

EDWARD M. PLUMER, JUNIOR,
Executor of the Estate of
Louise Plumer Osgood, Deceased,
Defendant

} SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Joseph Schneider, of the firm of Schneider & Reilly, plaintiff's attorney, whose address is 73 Tremont Street, City of Boston, Massachusetts, an answer to the complaint which is herewith served upon you, within twenty days

after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JOHN J. CANAVAN
Clerk of Court.
HELEN I. TWEEDY
Deputy Clerk.

Date: February 6, 1963. [Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 7th day of February 1963, I received this summons and thereafter on the 8th day of February 1963, at 4:00 PM I summoned the within defendant, Edward M. Plumer by leaving at his last and usual place of abode, 8 High Rd., Newburyport, in said District in the hands of his wife, Mrs. Edward M. Plumer, a true and attested copy of this Summons together with copy of Complaint.

Marshal's Fees	
Travel	$8.88
Service	3.00

ROBERT F. MOREY
United States Marshal.
By F. J. OCZKOWSKI
Deputy United States Marshal.

Subscribed and sworn to before me, this day of 19

[SEAL]

.....

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

UNITED STATES OF AMERICA
DISTRICT OF MASSACHUSETTS } ss:

I, John A. Canavan, Clerk of the United States District Court for the District of Massachusetts, do hereby certify that the annexed and foregoing is a true and full copy of the original summons issued on February 6, 1963 and returned and filed in the office of the Clerk on February 20, 1963 in the cause entitled:

EDDIE V. HANNA v. EDWARD M. PLUMER, JUNIOR, Executor of the Estate of Louise Plumer Osgood, Deceased and numbered on the Civil Action docket 63-91-S now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Boston this 7th day of March, A. D. 1963.

JOHN A. CANAVAN
Clerk.
By HELEN I. TWEEDY
Deputy Clerk.

Notice of Claim.

COMMONWEALTH OF MASSACHUSETTS
Essex, ss. PROBATE COURT

To the Register of Probate for the County of Essex:

Please file the following Notice of Claim in the estate of Louise Plumer Osgood late of 225 Water Street, Newberryport, Massachusetts in said County.

To Edward M. Plumer, Jr. 8 High Road of Newbury, Massachusetts in the County of Essex Executor of the will of said Louise Plumer Osgood

This notice is given you under and by virtue of

Section 20 of Chapter 202 of the General Laws of Massachusetts

Section 9 of Chapter 197 of the General Laws of Massachusetts

The estate of said Louise Plumer Osgood is indebted to the undersigned in the sum of One Hundred Twenty-five Thousand and no/100 Dollars for damages and injuries suffered to the person and property of Eddie Hanna by reason of the negligence and fault of Louise Plumer Osgood

April 17, 1962.

Name of Claimant, MRS. EDDIE HANNA.
Address of Claimant, 1000 S.E. 4th St Ft. Lauderdale, Fla.

By her Attorney Mills & Mills, Attorneys at Law, 917-1st Nat'l Bank Bldg., Canton 2, Ohio

ESSEX, ss.

PROBATE OFFICE
Mar. 20, 1963

A true copy
Attest:

JOHN J. COSTELLO
Register

Appointment of Executor.

COMMONWEALTH OF MASSACHUSETTS
PROBATE COURT

ESSEX, ss. DOCKET No. 270742

I, JOHN J. COSTELLO, Register of Probate for said County of Essex hereby certify, that at a Probate Court held at

Salem in and for said County, on the first day of March in the year of our Lord one thousand nine hundred sixty-two, Edward M. Plumer, junior, of Newbury in the County of Essex was duly appointed executor of the will of Louise Plumer Osgood, late of Newburyport in said County of Essex and gave bond as required by law, for the due performance of said trust.

I further certify, that it appears by the records and files of said Court, that said appointment remains in full force.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this twenty-fourth day of January in the year of our Lord one thousand nine hundred sixty-three.

JOHN J. COSTELLO
Register.

Docket Entries.

270749	Osgood, Louise Plumer, Newburyport	
	Date of death January 6, 1962 (See Cons. 270353)	
	Pet. for Prob. of Will (filed Jan. 8, 1962) Fee Pd.	
	Will 1298 462	(" Jan. 8, 1962)
	Affidavit of Witness	(" Jan. 10, 1962)
	Citation & Return of Service	(" Feb. 2, 1962)
	Bond Fee Pd.	(" Feb. 27, 1962)
	Military Affidavit	(" Feb. 27, 1962)
1962 Mar. 1	Prob. & Bond, Edward M. Plumer, Jr., Nby. Exor.	
1962 Apr. 23	Pet. for Authority to sell motor vehicle (filed Apr. 10, 1962) Fee Pd.	
	Notice of Claim	(filed Apr. 25, 1962)

ESSEX, ss. PROBATE OFFICE
Mar. 20, 1963

A true copy of docket entries.
Attest:

JOHN J. COSTELLO
Register.

[fol. 25]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6272

EDDIE V. HANNA, Plaintiff, Appellant,

v.

EDWARD M. PLUMER, JR., Executor,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Albert P. Zabin, with whom *Schneider & Reilly* was on brief, for appellant.

Alfred E. LoPresti and *James T. Connolly* for appellee.

OPINION OF THE COURT—April 29, 1964.

ALDRICH, *Circuit Judge*. This is an action in which plaintiff, a citizen of Ohio, claims damages in excess of $10,000 for personal injuries as a result of an automobile accident in South Carolina allegedly caused by the negligence of a Massachusetts citizen, now deceased. The defendant, also a Massachusetts citizen, is the decedent's executor. The defendant qualified as executor by filing bond on March 1, 1962. On February 6, 1963 the complaint was filed in the district court for the District of Massachusetts. On February 8 service was made by leaving a copy of the summons with the defendant's wife at his residence, in compliance with F.R.Civ.P. 4(d)(1). The defendant's answer was filed [fol. 26] on February 26. The so-called "short statute of limitations," Mass. G.L. (Ter. Ed.) c. 197 §9, provides that

actions against an executor must be "commenced within one year from the time of his giving bond." In addition to timely commencement, the statute provides that the executor "shall not be held to answer" unless within the year he had been served in hand, or "service . . . [is] accepted by him," or there has been filed in the proper registry of probate a notice identifying the claim, the claimant and "the court in which the action has been brought." In her complaint plaintiff alleged that she had already filed the requisite notice in the registry of probate, and asserted that the action had been brought "within the time required and in accordance with the procedure of the law of the Commonwealth of Massachusetts in [sic] filing suit against the said decedent's Estate." Defendant's answer denied these allegations, and affirmatively alleged that the action could not be maintained because it had been "brought contrary to and in violation of the provisions of . . . Section 9." At the time the answer was filed it was in fact still possible to comply with the statute. However, plaintiff took no further action.

After March 1, 1963 defendant moved for summary judgment with an affidavit revealing that the notice filed in the probate registry made no mention of the court in which the action had been or even was to be brought, or, indeed, that any action was even contemplated. No countering affidavit was filed. The notice thus must be taken as materially defective. *Cf. United States* v. *Saxe*, 1 Cir., 1958, 261 F.2d 316, 320. Alternatively, the service of process did not satisfy the special notice requirements of the executor's statute, not having been made in hand, nor had the defendant in terms accepted service. The district court, holding the Massachusetts statute was controlling and on [fol. 27] these facts not complied with, granted the defendant's motion for summary judgment. From this plaintiff appeals.

In this court plaintiff abandons the allegations of her complaint that she had complied with the Massachusetts "procedure," but asserts that such compliance was unnecessary because, since the action was brought in the federal court, the matter was one of federal procedure

governed by F.R.Civ.P. 4(d)(1). We think it clear, however, that we are concerned with a substantive rather than a procedural matter. The service of process by the so-called "last and usual" method was in entire compliance with both Rule 4(d)(1) and the usual Massachusetts procedure, so far as service was concerned. Further, the action was commenced in time, and served in time, in full compliance with the requirements of the ordinary Massachusetts statutes of limitations. The difference was that in addition to service sufficient to satisfy due process requirements for in personam jurisdiction, the executor, a creature of the Massachusetts court charged with the administration and disposition of the estate sought to be reached, was by law entitled to receive specific notification of the action within the year. Special statutes of limitations to effectuate the safe and "speedy settlement of estates that the heirs might be quieted," *Brown* v. *Anderson*, 1816, 13 Mass. 201, 202, have been operative in the Commonwealth for over 150 years. Relatively recent amendments evince a clear legislative purpose to require personal notification within the year, ascertainable of record. St. 1931, c. 417, §1; St. 1954, c. 552, §1. See discussion in *Parker* v. *Rich*, 1937, 297 Mass. 111, 113; Judicial Council of Massachusetts Twenty-ninth Report 46 (1953), 38 Mass. L.G. 46 (December 1953). This matter is quite apart from the question of what is adequate service of process in the procedural sense. Actual, record notice would appear [fol. 28] fully as substantive a state requirement binding in the federal court as is a requirement that in certain actions a bond must be furnished for costs. *Cf. Cohen* v. *Beneficial Loan Corp.*, 1949, 337 U.S. 541. And see, in a more closely related question, *Ragan* v. *Merchants Transfer & Warehouse Co.*, 1949, 337 U.S. 530.

Since the defendant's success would seemingly entirely bar plaintiff's remedy, and in view of the importance of the matter, even though plaintiff does not argue the point we will consider the correctness of defendant's contention that the Massachusetts statute was not in substance satisfied. We put to one side any contention that the statutory requirements were so loose that actual notice might be

established by proof aliunde. *But cf. Fleisher Eng'r & Constr. Co.* v. *United States,* 1940, 311 U.S. 15. The statutory rigidity, which its history shows has been increased rather than diminished, forbids such a construction. On the other hand, an examination seems warranted of the consequence of the voluntary filing of an answer when the statute states that an answer shall not be required. We would agree that the filing of an answer after the year had expired would be without legal effect in view of the settled Massachusetts principle that an executor cannot waive absolute rights of his estate. *Finance Corp. of New England* v. *Parker,* 1925, 251 Mass. 372; *Rosenblatt* v. *Foley,* 1925, 252 Mass. 188; *Galto* v. *Foley,* 1936, 296 Mass. 306, 310; *Epstein* v. *Blender,* 1957, 15 Mass. App. Dec. 74. However, where such rights have not become established, the filing of a general appearance or answer within the year might well be regarded as an acceptance of service, an action specifically authorized. *Cf. Tobin* v. *Downey,* 1942, 310 Mass. 721; *Lapresti* v. *Burton,* 1936, 295 Mass. 6. That, however, is not this case. We could not construe as an "acceptance" of service an answer which specifically complained of the impropriety of the service and the lack of proper notice. *Cf.* F.R.Civ. [fol. 29] P. 12(b). If this view be thought unduly technical we might add that it is entirely conceivable that the decedent driver was insured, and that the summons may have been forwarded to the company, and by it to its counsel, without any action by or actual notice to the executor.

Judgment will be entered affirming the judgment of the District Court.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

JUDGMENT—April 29, 1964.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

Roger A. Stinchfield, Clerk.

Approved: Peter Woodbury, Ch. J.

Thereafter, on May 5, 1964, mandate was stayed.

[fol. 30]

Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 31]

SUPREME COURT OF THE UNITED STATES

No. 171, October Term, 1964

EDDIE V. HANNA, Petitioner,

vs.

EDWARD M. PLUMER, JR., Executor

ORDER ALLOWING CERTIORARI—October 12, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.